

Decision (D.) 04-05-006, as modified by D.05-01-034 and D.05-05-049

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Raw Bandwidth Communications, Inc.,

Complainant,

vs.

SBC California, Inc. (U 1001 C) and SBC
Advanced Solutions, Inc., (U 6346),

Defendants.

Case 03-05-023
(Filed May 15, 2003)

OPINION RESOLVING COMPLAINT

I. Summary

In today's decision, we find that Pacific Bell Telephone Company (SBC California)¹ and SBC Advanced Solutions, Inc. (SBC ASI) unreasonably discriminate against Raw Bandwidth Communications, Inc. (Raw Bandwidth) and violate applicable law by certain of Defendants' practices as they affect Digital Subscriber Line (DSL) services.

Specifically, this complaint concerns the situation in which the telephone subscriber receives basic service from one carrier (here, Defendant

¹ Although the complaint named SBC California, Inc. as a defendant, the correct name for the legal entity is Pacific Bell Telephone Company, which also does business as SBC California.

SBC California) and DSL service from an Internet Service Provider (ISP) that is unaffiliated with the carrier providing basic service. The Complainant and Defendants have managed to settle many of the problems underlying the original complaint. Two problems remain and are before us today.

The first problem arises when the carrier providing basic service terminates that service to the subscriber for nonpayment. Our rules require advance notice to the subscriber before termination. Raw Bandwidth argues that the carrier providing basic service must give substantially the same advance notice to the ISP (DSL service provider), which effectively will no longer be able to provide DSL service upon termination of the subscriber's basic service.² The assigned Administrative Law Judge (ALJ) granted the Defendants' motion to dismiss the complaint insofar as it seeks to impose this additional notice requirement, and Raw Bandwidth has appealed the ALJ's ruling. We affirm the dismissal, albeit our reasoning differs slightly from that of the ruling, but we direct Defendants to negotiate this notice requirement with Raw Bandwidth.

The second problem (the alleged unreasonable discrimination) arises when the subscriber calls repair (611) for a question or difficulty with DSL service. Often, the subscriber calls the carrier providing basic service, but in this situation, responding to the question or difficulty generally will be the responsibility of the ISP, to whom, consequently, the subscriber is referred. The manner of the referral is the crux of the complaint in this regard. The Defendants currently enable the subscriber to be connected without redialing to the service department of the ISP when the ISP is an affiliate of Defendant SBC California.

² Raw Bandwidth purchases DSL Transport from SBC ASI using a line sharing arrangement. When voice service is disconnected by SBC California, line sharing no longer is viable. SBC California initially suspends dial tone for five days for nonpayment of basic service charges and then disconnects the line.

(In other words, the subscriber does not have to hang up and call the affiliated ISP directly). Raw Bandwidth, an unaffiliated ISP, sees no reason why SBC California cannot automatically connect Raw Bandwidth's subscribers to its service department when they call 611 with a DSL question or difficulty. We hold that the subscribers of unaffiliated ISPs should not be burdened with the additional step of hanging up and calling their service department, while subscribers of SBC California and its affiliates are not so burdened when they call service repair.

II. Procedural Background

We held a prehearing conference (PHC) on August 23, 2003, to establish the scope of this proceeding and set a hearing schedule. Both prior and subsequent to the PHC the parties had settlement discussions and resolved many issues.

On June 30, 2003, Defendants filed a motion to dismiss the complaint, which Raw Bandwidth opposed. On July 8, 2003, Complainant filed a request for withdrawal of issues concerning listing ISPs on the SBC.com web page. On September 11, 2003, the Assigned Commissioner Ruling's (ACR) and scoping memo granted the unopposed request of Raw Bandwidth to withdraw two counts of the Complaint. The ACR also partially granted Defendants' motion to dismiss part of Raw Bandwidth's complaint, specifically, the allegation that Defendants unreasonably disconnected DSL Transport whenever Defendants disconnected a customer's voice line service for nonpayment. The ACR noted that the relief Raw Bandwidth requested, *i.e.*, advance notice of disconnection, raised privacy concerns. The ACR granted Raw Bandwidth leave to amend the complaint to request relief that would obviate the privacy concerns.

Raw Bandwidth filed its First Amended Complaint on September 22, 2003. On October 23, 2003, Defendants filed a joint motion to dismiss and to strike

portions of the amended complaint. On October 31, 2003, the parties reported that they anticipated resolving remaining issues with the exception of the 611 transfer issue and the disconnection issue subject to the motion to dismiss. On November 7, 2003, Complainant filed a response opposing the motion to dismiss.

On October 10, 2003, Raw Bandwidth's attorney sent an email message to request that the hearings scheduled for October 15 be taken off calendar and that the matter be submitted on briefs, because the parties had settled two of the three remaining issues.³ The ALJ granted the request to take the hearings off calendar and concurred with the filing of opening briefs on November 10 and reply briefs on November 25, 2003. Both parties submitted opening and reply briefs.

By December 22, 2003 ALJ Ruling, the motion to dismiss portions of the amended complaint was granted, because the relief requested (regarding disconnection of DSL Transport) would violate the settlement agreement between the California ISP Association, SBC California, and SBC ASI adopted in Decision (D.) 03-07-032.

In sum, the parties were able to resolve among themselves several matters from the original complaint; those matters are not discussed further. The issues before us today are (1) the request by Raw Bandwidth to reconsider the ALJ Ruling dismissing parts of the amended complaint, and (2) the discrimination issue, which was submitted on briefs. As discussed in sequence below, we affirm the dismissal and deny relief on the discrimination issue.

³ Raw Bandwidth has not formally withdrawn the two issues concerning relief to which Complainant was entitled for matters settled by the parties.

III. Motion for Reconsideration of December 22, 2003 ALJ Ruling

Raw Bandwidth requests reconsideration of the ALJ Ruling dismissing portions of the amended complaint. Raw Bandwidth alleges the ruling is not supported by the record, and it disagrees with the ruling's conclusion that we cannot grant the relief requested by Raw Bandwidth, *i.e.*, advance notification of disconnection. Defendants support the ruling and assert Raw Bandwidth mostly reargues its position opposing Defendants' motion to dismiss.

We affirm the ruling's conclusion that SBC ASI need not provide DSL Transport if SBC California disconnects the underlying voice service. (In practice, DSL Transport remains connected for five days after voice service has been disconnected.) DSL Transport is a detariffed service offering subject to conditions mandated by the Federal Communications Commission (FCC). (Memorandum Opinion and Order, *In the Matter of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000 (2002), ¶ 1.) Under SBC ASI's general services agreement, which provides that DSL Transport is offered via a line sharing arrangement, the line cannot be shared and DSL Transport no longer is offered once the voice line is disconnected.⁴ (Ruling, pp. 2-3.) Thus, disconnection of DSL Transport when the voice line is disconnected does not violate the terms under which DSL Transport is offered, nor does disconnection under these circumstances violate any law or order of this Commission.

⁴ "Company's [SBC ASI] DSL Transport is offered via a line sharing arrangement (High Frequency Portion of the Line-HFPL) over an SBC ILEC-provided (non-resold, non-UNE-Platform) retail POTS line." (SBC ASI's General Terms & Conditions, section 6.2.2.)

There also is no statute or Commission order that bars disconnection of non-basic services for nonpayment of basic service charges. DSL, and by extension, DSL Transport, is not a basic service under Commission rules. Disconnecting DSL Transport for nonpayment of basic service charges does not violate a Commission order. (*See Campbell v. Pacific Bell Telephone Co.*, D.02-06-011, 2002 Cal. PUC LEXIS 391, **9-10.)⁵

Raw Bandwidth argues that failure to warn it in advance of disconnection of DSL Transport is unreasonable and presents problems, *e.g.*, because notice of voice disconnection sometimes is sent to the wrong address and ISPs have no opportunity to contact their subscriber to warn that subscriber of the disconnection of DSL. We reject this argument. SBC California, like any provider of basic service, must give proper notice to its subscriber before disconnecting the subscriber's basic service. The subscriber's ISP is a third party who has some interest in the disconnection of that service but who does not thereby become entitled to the same advance notice given the subscriber. Although the subscriber's ISP has no right to the disconnection notice sent to the voice service subscriber, public policy considerations favor giving the DSL Transport customer (the ISP) reasonable advance notice of the pending disconnection of DSL Transport service. DSL Transport continues five days after voice service is suspended. During that period, the issue is advance notice of DSL Transport disconnection, not voice disconnection, and the privacy protections afforded the voice subscriber for disconnection of voice service no longer apply.

⁵ However, as discussed *infra*, DSL Transport is a basic service under the FCC's Computer III rules.

Of further concern is Raw Bandwidth's contention that Defendants refuse to negotiate these terms of the general services agreement with Raw Bandwidth. In the FCC's "forbearance from tariff regulation" proceeding, SBC Communications, Inc. (SBC) committed to publishing "general rates, terms, and conditions for ISP broadband access arrangements that unaffiliated ISPs can either opt into or use as the starting point for negotiating alternative rates, terms, and conditions." (Memorandum Opinion and Order, supra, at ¶ 11.) The FCC relied on those commitments in finding that "forbearance from tariff regulation" criteria were met. (*Id.* at ¶ 13.) The failure to negotiate specific terms would violate SBC's commitment to the FCC that ISPs can negotiate alternate terms. Thus, we conclude SBC ASI must negotiate these terms with Raw Bandwidth. Among the terms that are subject to negotiation, are terms relating to notice to the ISP in the circumstances we have been discussing.

Raw Bandwidth maintains that the ALJ Ruling did not apply the appropriate standard in determining that portions of the first amended complaint should be dismissed. Raw Bandwidth is correct that the standard for dismissing complaints or portions thereof is the summary judgment standard and that the moving party must prevail based solely on undisputed facts and matters of law. The ruling determined that Raw Bandwidth's proposal to permit subscribers to waive privacy concerns to enable Raw Bandwidth to receive advance notice of disconnection was contrary to the settlement agreement we approved in D.03-07-032. That settlement agreement precludes SBC California, when acting on behalf of its affiliated ISP, from being able to identify which unaffiliated ISP is the provider. Raw Bandwidth asserts that relaying information from SBC California to SBC ASI could be a means of providing advance notice to the ISP that would not violate the settlement agreement. If true, that procedure could resolve these legal concerns. Because we determine

that the failure to give advance notice to the ISP does not violate statute or Commission order, we need not weigh the legality or merits of Raw Bandwidth's alternate advance notice proposal. However, we direct SBC ASI to negotiate with Raw Bandwidth to determine the feasibility of this or alternate proposals to satisfy the FCC's "forbearance from tariff regulation" order.

IV. Discrimination Issue

The parties stipulated to the relevant facts concerning the connection to the ISP for DSL repair services. If a caller dials 611 from an SBC California telephone line, the caller receives various Interactive Voice Response System (IVR) prompts, including entering the caller's telephone number. If the telephone number is for a line that has DSL Transport Service, the next prompt states: "Our records indicate that your voice line includes DSL service. If you are reporting trouble on the data portion of your line, press 1" If the caller presses 1, the next prompt states, " If you are calling about your DSL: Internet access service from SBC Internet Services, press 1 now. Otherwise, if you are calling about DSL Internet access service from another Internet service provider, please hang up and call your Internet service provider." If the caller presses 1, IVR will connect the caller to SBCIS' IVR.

SBC California connects over 10,000 calls each month from its 611 IVR to SBCIS. SBC California does not offer such a connection from its 611 IVR to any other ISP. The issue is whether Defendants unreasonably discriminate by providing subscribers of their affiliated ISP, SBCIS, who dial 611 for DSL repair services the option of connecting to SBCIS without having to hang up, but telling unaffiliated ISPs' subscribers they must hang up and call their ISP.

As a practical matter, both SBCIS and unaffiliated ISPs have numbers for subscribers to access DSL repair services other than 611.

We note that a significant number of subscribers call 611 for repair services, and a significant number are connected to SBCIS. We therefore hold that this differential treatment is unlawful because the fact that Raw Bandwidth's DSL service subscriber must hang up and call Raw Bandwidth's service department disadvantages unaffiliated ISPs.

A. Section 453

Section 453 prohibits public utilities from making or granting any preference or advantage or from establishing or maintaining any unreasonable difference "as to rates, changes, service, facilities or in any other respect." (Pub. Util. Code, § 453(a); see generally, *California Portland Cement Co. v. Southern Pacific Co.* [D.32280] (1939) 42 Cal.P.U.C. 92, 117.) The preference may be considered undue only if it provides an advantage to some customers and a disadvantage to others. (Id. at p. 117.) To establish any such effect, comparison must be made between comparable situations. (*Reuben H. Donnelley Corp. v. Pacific Bell* [D.91-01-016] (1991) 39 Cal.P.U.C.2d 209, 242.) Here:

- SBC California transfers over 10,000 calls per month from its 611 IVR to its affiliated ISP, SBCIS.
- SBC California does not transfer calls from its 611 IVR to unaffiliated ISPs.
- If an SBCIS subscriber with a DSL repair problem dials 611 from an SBC California telephone line, the caller receives an IVR prompt that will permit the customer to be connected to SBCIS without having to hang up and dial a new number. A non-SBCIS subscriber with a DSL problem who dials 611 from an SBC California telephone line receives an IVR prompt to hang up and call the subscriber's ISP.

These findings clearly establish the fact of discrimination, which, indeed, is undisputed. They also establish the fact that discrimination operates

to confer an advantage to some customers and a disadvantage to others. Finally, it is undisputed that SBCIS and Raw Bandwidth are both ISPs, and that they are comparably situated, save for the fact that SBCIS is an affiliate of SBC, and Raw Bandwidth is not.

Federal law does not dictate a different conclusion. The parties stipulated that the FCC's Computer III rules govern SBC California's obligations regarding enhanced services, and agree that the rules require SBC California provide unaffiliated ISPs nondiscriminatory access to the same services and functions underlying the provision of enhanced services to its affiliated ISP. SBC's focus on enhanced services, however, is not the proper focus here. DSL Transport is a basic common carrier transmission service, not an enhanced service. (*WorldCom v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001) (DSL-based advanced services qualify as telecommunications services (i.e., common carrier services) to which certain Title II provisions apply) (vacated on other grounds); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19, 237, 19, 247, ¶ 21 (1999) ("bulk DSL services sold to [ISPs]...are telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services"); *In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24, 011, 24, 030, ¶¶ 36-37 (1998) (Bell companies are under a continuing obligation under Computer II to offer competing ISPs non-discriminatory access to the telecommunications services utilized by Bell's information services). And the FCC has made clear that, for regulatory purposes, DSL transport does not lose its character as a basic service just because it is bundled for sale with other, enhanced services. (See, e.g., *In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability* (1998) 13 F.C.C.R. 24,011 ¶¶ 36-37.) Accordingly, when a customer dials 611 to seek repair or information about

problems with his or her DSL service, the customer is, at least in part, seeking to resolve an issue with the customer's basic service – DSL transport. The fact that the problem may in fact lie elsewhere is irrelevant unless and until the source of the problem has, in fact, been identified. Thus, when SBC provides more favorable treatment to customers of its own affiliates who dial 611 when such customers seek repair or information about problems with their DSL service, it is failing to comply with the FCC's requirement that it provide non-discriminatory access to basic services. In this circumstance, nothing in federal law undermines our conclusion that SBC's discrimination violates section 453.

That the FCC's decision in *Computer III* allows SBC to use the same personnel and resources to support its provision of both basic and advanced services does not dictate a different conclusion. In *Computer III*, the FCC eliminated existing rules that prohibited such dual-use of resources and personnel, concluding that carriers could use the same personnel and resources to support both basic and advanced services without creating an unacceptable risk that carriers would use that overlap to favor their own enhanced services offerings over those of competitors, by discriminating with respect to basic services necessary to provide those offerings. (See, e.g., *California v. FCC* (9th Cir. 1990) 905 F.2d 1217, 1225-30.) The FCC did so in light of its conclusion that certain other safeguards, such as its Comparably Efficient Interconnection ("CEI") rules, would adequately mitigate the risks. (See *id.*) *Computer III*, however, merely concluded that carriers could use the same resources and personnel without creating an undue *risk* of illegal discrimination. The FCC never has held that carriers could use their resources and personnel actually to discriminate with respect to basic services.

Similarly, the fact that the FCC's CEI rules do not expressly prohibit discrimination with respect to 611 calls does not imply a federal intent to

preempt state regulation in this area, as SBC suggests. (See SBC Reh'g App. at 14-15.) The CEI rules were intended to be “safeguards,” to mitigate risks of discrimination. (See *Calif. v. FCC*, *supra*, 905 F.2d at pp. 1225-30.) There is no authority that these rules constitute a “safe harbor provision,” and that compliance with those rules protects carriers from any charges of discrimination. The mere fact that federal law does not explicitly prohibit specified conduct is not sufficient to show an intent to preempt state law. (See *Toy Mfgs. of America v. Blumenthal* (9th Cir. 1993) 986 F.2d 615, 621-22 [demonstration of specific Congressional intent required].) And nothing in any FCC ruling, or in the Communications Act, even suggests any congressional intent to use the CEI rules, or any other rules, to supplant the bedrock statutory principle of non-discrimination with respect to basic network services, or to supplant existing state prohibitions on such conduct.

B. Competition

Concerning the issue of competition, we need only consider whether by requiring customers of unaffiliated ISPs to hang up and call their ISP, those customers are placed at a competitive disadvantage by being burdened by such a requirement when callers of affiliated ISPs are not. From a competition viewpoint, it is enough that customers of unaffiliated ISPs must take that extra step. Moreover, our focus is not with SBCIS, but rather with the local exchange carrier over whom we have plenary authority as granted by the Legislature and the California Constitution, art. XII. We conclude that SBC California, by its practices, confers an undue competitive advantage to its affiliates if customers can use abbreviated dialing (611) for repair of SBC's DSL service, but must use regular dialing to reach the unaffiliated DSL provider.

V. Comments on Draft Decision

We initially categorized this proceeding as an adjudication that would go to hearing. We adhere to that category but find, with the agreement of the parties, that a hearing is not needed.

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure.⁹ Comments were filed on April 27, 2004 and reply comments were filed on May 3, 2004. Defendants support the draft decision; Raw Bandwidth alleges the draft decision errs in its analysis and findings.

In response to the parties' comments, we made editorial changes and clarifications. However, we made no substantive change to the draft decision's disposition of the Complaint.

Raw Bandwidth alleges that the draft decision does not address the just and reasonable service standards of §§ 451 and 2896(c) in connection with SBC ASI's procedures for disconnecting DSL Transport. We disagree. Raw Bandwidth's contention was addressed in the December 22, 2003 dismissal ruling, affirmed in the draft decision. In the draft decision we similarly rejected Raw Bandwidth's claim that Defendants' procedure was unreasonable but supported a public policy interest in reasonable notice. Defendants contend it is not feasible to provide more than scant notice, based on existing procedures. Nonetheless, we continue to direct SBC ASI to negotiate with Raw Bandwidth to resolve this issue to satisfy SBC's commitment in the "forbearance from tariff regulation" proceeding.

⁹ Defendant's note Raw Bandwidth's Opening Comments exceed the 15-page limit under Rule 77.3 of the Commission's Rules of Practice and Procedure.

Raw Bandwidth erroneously alleges dismissing the remaining counts in its First Amended Complaint violates its due process rights. In fact, the draft decision did not dismiss any issue raised in the First Amended Complaint. The ACR and scoping memo narrowed the scope of the proceeding to three issues, granted dismissal of the Third Cause of Action, Counts 3 and 4, and permitted amendment of the Complaint to request relief that would not violate privacy rights.

The scoping memo relied on Raw Bandwidth's characterization of the issues in its Prehearing Conference Statement and at the PHC in setting three issues for hearing.¹¹ Narrowing the scope of the proceeding resulted from Raw Bandwidth's request in its August 19, 2003 Prehearing Conference Statement to put two issues on hold, because Complainant had not decided how to pursue them. Raw Bandwidth and Defendants had resolved two other issues and wanted to continue settlement negotiations.¹²

At that time, Raw Bandwidth characterized its Third Cause of Action, Count 3, subject to the motion to dismiss, as raising two issues: 1) the failure of SBC service representatives to warn end users that disconnecting their voice line also will disconnect their DSL; and 2) the failure to warn ISPs that the voice line has been disconnected for nonpayment. Although amendment of the Complaint was limited to requesting relief that did not raise privacy concerns, the First Amended Complaint added new counts. Although Raw Bandwidth earlier characterized Count 3 as raising two issues, Raw Bandwidth stated in the First

¹¹ The PHC was held over three months after the filing of the Complaint because of scheduling conflicts with the original setting of the PHC on July 9, 2003.

¹² Raw Bandwidth's attorney sent e-mail to the ALJ on September 15, 2003 requesting clarification of the scoping memo. The ALJ clarified that the issues Raw Bandwidth had not decided how to pursue were not within the scope of the proceeding.

Amended Complaint that the Complaint's Count 3 (originally four paragraphs) had been split into four counts for clarity of the relief requested (now twelve paragraphs).

Raw Bandwidth would have us set another PHC to address all remaining issues, including those for which hearings were taken off calendar based on the parties' representations that they had settled the issues.¹³ We decline to do so. Our decision resolves the only issue contained in the scoping memo that the parties have not settled. We also resolve the core allegation of the original complaint concerning disconnection.

Although the scoping memo did not include the discrete disconnection sub-issue concerning the failure of service representatives to warn subscribers that disconnection of the voice line would disconnect DSL, we do not find that omission, which Raw Bandwidth did not challenge, violates Raw Bandwidth's due process rights. Raw Bandwidth states the issue may be settled shortly. If not, we have directed SBC ASI to negotiate terms of service with Raw Bandwidth to satisfy the FCC's "forbearance from tariff regulation" order.

We clarify the procedural status of the remaining counts of the First Amended Complaint to ensure Raw Bandwidth can continue to negotiate with Defendants in order to resolve those issues. We dismiss without prejudice all remaining counts of the First Amended Complaint. Raw Bandwidth also brought to our attention during this proceeding Defendants' failure to negotiate other issues not raised in the Complaint. We encourage Defendants to negotiate those issues as well. Should Raw Bandwidth need to file another complaint on

¹³ At Raw Bandwidth's request on October 10, 2003, the scheduled hearings were taken off calendar because Raw Bandwidth represented that two issues were settled and would be dismissed with prejudice and the third issue could be submitted on stipulated facts and briefs.

issues raised in this Complaint or brought to our attention in this proceeding, we request that Raw Bandwidth provide us with a status report on the results of informal negotiations.

VI. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janice Grau is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. SBC ASI's General Terms & Conditions for DSL Transport require that DSL Transport be offered via a line sharing arrangement. DSL Transport no longer is offered once the voice line is disconnected. Defendants' practice is that five days after dial tone has been suspended for nonpayment of basic service charges, Defendants notify the ISP, either its affiliated ISP or an unaffiliated ISP, that DSL Transport is being disconnected and disconnect the line.

2. SBC Communications, Inc. committed to negotiate alternative rates, terms, and conditions with unaffiliated ISPs for broadband access arrangements.

3. SBC California transfers over 10,000 calls per month from its 611 IVR to its affiliated ISP, SBCIS.

4. SBC California does not transfer calls from its 611 IVR to unaffiliated ISPs.

5. If an SBCIS subscriber with a DSL repair problem dials 611 from an SBC California telephone line, the caller receives an IVR prompt that will permit the customer to be connected to SBCIS without having to hang up and dial a new number. A non-SBCIS subscriber with a DSL problem who dials 611 from an SBC California telephone line receives an IVR prompt to hang up and call the subscriber's ISP.

6. SBC California does not have a CEI offering or tariff for access to or transfer from 611.

7. Raw Bandwidth mentions Pub. Util. Code § 453 and 47 U.S.C. § 202 in opening and reply briefs in support of its argument that SBC California's 611 connection procedure violates the statutes' anti-discrimination requirements.

8. There is no evidence that SBC's affiliated ISP and Raw Bandwidth are not similarly situated in all material respects for the purposes of Pub. Util. Code § 453.

9. The December 22, 2003 ruling addressed Raw Bandwidth's contention that SBC ASI's disconnection procedure is not just and reasonable under Pub. Util. Code §§ 451 and 2896(c).

10. The scoping memo set three issues for hearing. Raw Bandwidth requested other issues be put on hold, because Raw Bandwidth had not decided how to pursue them. Raw Bandwidth requested two issues set for hearing be removed from the calendar because they had been settled.

11. The September 11, 2003 ACR partially granted Defendants' motion to dismiss and granted Raw Bandwidth leave to amend the complaint to request relief that would obviate privacy concerns.

12. Raw Bandwidth's First Amended Complaint added new counts to its Third Cause of Action.

Conclusions of Law

1. Defendants are required to negotiate certain terms and conditions with ISPs; these terms may include advance notice to Raw Bandwidth of DSL Transport disconnection incidental to termination for nonpayment of basic service to an SBC California subscriber.

2. Pub. Util. Code § 453 prohibits SBC California's practice of requiring on 611 calls for digital subscriber line repair service, the subscribers of unaffiliated ISPs to hang up and call their service department while subscribers of its affiliates are not required to take that extra step.

3. DSL Transport is not a basic service under Commission rules and can be disconnected if a subscriber fails to pay basic service charges. DSL Transport is a basic service under the FCC's Computer III rules.

4. SBC California, by its practices, confers an unlawful competitive advantage on its affiliates if its customers can use abbreviated dialing (611) for repair of SBC's DSL service, but others must use regular dialing to reach the unaffiliated DSL provider.

5. All counts not within the scope of the proceeding as set forth in the scoping memo are dismissed. All counts set forth herein and then settled also are dismissed.

6. It is reasonable to make this order effective today in order to provide conduct guidance.

O R D E R

IT IS ORDERED that:

1. Except as provided below with respect to Raw Bandwidth's claim regarding discrimination in the provision of 611 service, all other claims in Raw Bandwidth's complaint are dismissed.

2. SBC shall not require the subscribers of unaffiliated ISPs to hang up and call their own ISP's service department while subscribers of SBC's affiliates are not required to take that extra step on 611 calls for digital subscriber line ("DSL") repair service. If SBC provides 611 service to facilitate service calls for DSL repair for customers of its affiliated ISP(s) -- connecting them directly to the appropriate service department -- it must provide the same service for customers of non-affiliated ISPs.

3. Defendants shall negotiate terms and conditions of service to Raw Bandwidth, as required by order of the Federal Communications Commission and discussed in the foregoing opinion.

4. The hearing determination is changed. Hearings are not necessary. Case 03-05-023 is closed.

This order is effective today.

Dated May 26, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
SUSAN P. KENNEDY
JOHN A. BOHN
Commissioners